United States Court of Appeals for the Second Circuit



APPELLANT'S APPENDIX

76-6038

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

JOSEPH ANTHONY CAMIRE, Infant, by his Father, JAMES ANTHONY CAMIRE, and his Mother, GAIL MARIE CAMIRE, AND JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, Individually,

B

Plaintiffs-Appellants,

-against-

UNITED STATES OF AMERICA,

Docket No. 76 CIV 6038

Defendant-Respondent.

RECORD ON APPEAL

appendix



LIVINGSTON L. HATCH, ESQ. Attorney for Appellants OFFICE & P.O. ADDRESS Village Offices & Civic Center Keeseville, New York 12944 (518) 834-7318

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant by his father, JAMES ANTHONY CAMIRE, and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, Individually,

Plaintiffs-Appellants,

-against-

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M.D.,

Defendants-Respondents.

Index No.

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that the above named plaintiffs-appellants, Joseph Anthony Camire, James Anthony Camire and Gail Marie Camire,

hereby appeal(s) to United States Court of Appeals - Second Circuit

from the decision and judgment of the Hon. James T. Foley, U.S. District Court , Northern District of New York, in this action, entered in the office of the Clerk of said Court

on the 9th day of October. 1975

and from each and every part thereof. Dated: October 20, 1975

Yours, etc.,

TO: U.S. District Court Clerk, J. R. Scully Utica, New York 13503

LIVINGSTON L. HATCH, ESQ.

Attorney(s) for plaintiffs and Appellant S Village Offices & Civic Center Keeseville, New York 12944

To U.S. Attorney James Sullivan

U.S. Attorney's Office

P.O. Building - Att.: Richard Hughes, Asst. U.S. Attorney
Albany, New Yorkefendants and Respondent:

and Respondent;

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant by his father, JAMES ANTHONY CAMIRE and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, Individually,

Plaintiffs,

74-CV-501

-against-

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M.D.,

Defendants.

APPEARANCES:

OF COUNSEL:

LIVINGSTON L. HATCH Attorney for Plaintiffs Village Offices & Civic Center Keeseville, New York 12944

JAMES M. SULLIVAN, JR. UNITED STATES ATTORNEY Attorney for Defendants United States of America and Capt. Donald Marger, M.D. Federal P. O. Building Syracuse, New York 13201

RICHARD K. HUGHES Assistant U.S. Attorney Federal P. O. Building Albany, New York 12207

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION and ORDER

The plaintiffs filed a notice of claim with the Department of the Air Force against the defendants and others on January 17, 1974. The administrative claim was denied on August 9, 1974, on the ground that, under the Federal Tort Claims Act, the plaintiffs failed to file the claim within two years of the accrual of the cause of action. 28 U.S.C. § 2401(b) (1970). The plaintiffs filed their verified complaint in this action on December 3, 1974, and an Assistant United States Attorney was personally served with a copy of the summons and verified complaint on December 4, 1974.

Defendant Dr. Donald Marger's motion to dismiss the complaint against him for malpractice was granted with consent of the attorney for the plaintiffs. Here we are only concerned with the motion to dismiss the complaint, as submitted by the United States of America, the remaining defendant.

EVILLA "A"

Two causes of action are contained in the complaint; the first seeks damages for the infant himself, Joseph Anthony Camire (hereinafter "Joseph"). The second is the customary derivative cause of action brought by Joseph's parents, James Anthony Camire and Gail Marie Camire (hereinafter "Mr. and Mrs. Camire"). Since Federal Rule of Civil Procedure 12(a) extends the time of the defendant to answer until after the disposition of this motion, the motion shall be determined according to the facts as alleged in the complaint.

FACTS

Joseph was born on November 27, 1970. At that time, Mr. Camire was in the United States Navy. Using her privileges to seek medical attention for the family, Mrs. Camire took her son to the Plattsburgh Air Force Base, on April 15, 1971. Captain Donald Marger, M.D., examined Joseph for symptoms that he diagnosed as "cutting teeth and a cold." Three or four days later, and then on April 22, 1971, Dr. Marger saw the infant again and continued the same treatment. On April 26, 1971, with Dr. Marger's approval, Mrs. Camire then took Joseph with her to California, where she brought the child to the emergency room at the Balboa Naval Hospital, located there. Mrs. Camire claims that the doctor told her that he suspected meningitis, in an advanced stage of three to four weeks. This allegation appeared in the notice of claim. The complaint alleges that the exact type of meningitis was undiagnosed, due to the advanced stage of the illness. However, Mrs. Camire's affidavit (Pg. 3) denies that any mention was made of the stage of the meningitis. Her affidavit does state that the doctor mentioned that the child should be baptized and given the Last Rites. However, it is averred in the complaint in this action that the plaintifis knew nothing of improper diagnosis, misdiagnosis, or the ability to make a claim against the government for negligence, until approximately July 10, 1973.

In June 1972, Mrs. Camire and Joseph returned to Plattsburgh, where further care and treatment was given to Joseph, now by government Dr. Metnick. A civilian doctor subsequently told Mrs. Camire that the undiagnosed meningitis was the cause of the injuries to Joseph. In a further inconsistency, the plaintiff asserts in her affidavit that this was the first time she knew about the undiagnosed meningitis "and that there may have been something wrong in the diagnostic process."

While discussing an unrelated matter with Mrs. Camire, Attorney Hatch discussed Joseph's medical problems with her, on July 10, 1973. Mrs. Camire's affidavit states that "she was unaware of any improper handling of the infant son until she was advised by another doctor and by an attorney that there was a possibility of a medical malpractice claim." All alleged acts of malpractice occurred solely during the week that Joseph was under Dr. Marger's care. The plaintiffs assert the timeliness of their action on the grounds that they did not know until July 1973 that a medical malpractice case existed, and that their first knowledge concerning a possible misdiagnosis was in June of 1972. To avoid a dismissal for lack of timeliness, plaintiffs assert that: (1) Joseph was constantly under the "care and treatment" of the United States, for injuries sustained at the Plattsburgh Air Force Base, until February 1973; (2) plaintiffs did not discover the "true nature" of the misdiagnosis until July 1973. The defendant United States of America rejects the assertion that the filing of the notice of claim in January of 1974 was timely.

LAW AND DECISION

The outcome of this motion to dismiss the complaint depends on the timeliness of the filing of the notice of claim. According to 28 U.S.C. § 2401(b), a tort claim against the United States is barred unless presented in writing to the appropriate federal agency within two years after the claim accrues, or unless the action is begun within six months after the date of mailing of a notice of final

denial of the claim by the federal agency. The purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time, in order to protect a defendant against stale and unjust claims which cannot be properly defended at a later time. Where a statute creates a new right of action (liability and remedy), such as a right of suit against the United States, and a condition requires suit to be brought within a specified time, then "the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all." The Harrisburg, 119 U.S. 199, 214 (1886). Here, the statute of limitations becomes part of the right of action, and if it is found to have not been complied with, then, despite the natural inclination for sympathy, the right, remedy and liability are forever barred. Unlike a simple statute of limitations, the defect is jurisdictional, and the action may be dismissed on motion for failure to state a cause of action. Quinton v. United States, 304 F.2d 234 (5th Cir. 1962). In addition, a plaintiff's derivative claim, stemming out of claims which are barred by limitations, is also barred.

The Federal Tort Claims Act provides that the two-year period, within which to give a notice of claim, begins when the "claim accrues." Although state law usually determines whether or not a cause of action exists, the period of limitations may begin to run at a later time, as commanded by federal law. Quinton v. United States, 304 P.2d 234 (5th Cir. 1962); contra, Tessier v. United States, 269 F.2d 305 (1st Cir. 1959). In the case of an erroneous diagnosis, the Ninth Circuit found that the malpractice claim accrued when the claimant discovered, or reasonably should have discovered, the acts or omissions constituting malpractice. Sungerford v. United States, 307 P.2d 99 (9th Cir. 1962). In a Pifth Circuit case with similar allegations of negligent medical advice and treatment (a medical examination did not find tuberculosis), the

court found that the cause of action does not accrue until there has been both a negligent act and resultant damage. In other words, a claim arises when the injurious consequences (damage) of faulty advice display their effect. Once there has been faulty medical advice at the time of examination, the cause of action accrues when the advanced condition is manifested. United States v. Reid, 251 F.2d 691 (5th Cir. 1958). Therefore, the claim could only accrue on the date of the doctor's act or omission, if the claimant knew that he was injured when the act in question took place. Bizer v. United States, 124 F. Supp. 949 (N.D. Cal. 1954). When the nature of the injury is such that it does not manifest itself to the patient immediately, the determination of when the cause of action accrued does not depend on when the injury was inflicted. It accrues when the plaintiff has reason to know he has been injured, which is usually when his condition is properly diagnosed and related to the earlier malpractice. However, the plaintiff cannot delay the action until he knows the precise extent of the damage; the statute of limitations begins to run before the claimant can ascertain the full damage. Portis v. United States, 483 F.2d 670 (4th Cir. 1973).

In accordance with the previous discussion, the defendant United States asserts that the cause of action accrued on or about April 27, 1971, when Mrs. Camire was told, by a different doctor, in a different hospital, that Joseph had some form of meningitis, rather than a "cold and teeth-cutting." The plaintiffs argue that the period of limitations was postponed or tolled until July 10, 1973.

There is no tolling of a federal statute of limitations where the filing of a complaint within a certain period is a condition precedent to commencing the action. Courts have interpreted the Federal Tort Claims Act strictly, even with extreme results [Lomax v. United States, 155 F. Supp. 354 (E.D. Pa. 1957)], "construed in

favor of repose for the United States." Cooper v. United States,
442 F.2d 908, 912 (7th Cir. 1971). The strength of federal preemption of otherwise invincible state rules on tolling is displayed
in case law that holds that infancy does not toll the statute of
limitations under the Federal Tort Claims Act. Finn v. United
States, 125 F. Supp. 721 (E.D.N.Y. 1957).

The plaintiffs rely on the doctrine of "continuous treatment," basing their argument on Kossick v. United States [330 F.2d 933 (2d Cir. 1964)] and Borgia v. City of New York [12 N.Y.2d 151 (1962)], in order to prove that the statute of limitations did not begin to run until July 1973. In Borgia, where the plaintiff remained in the hospital, the New York Court of Appeals found that the continuous treatment ended when the patient was discharged, subsequent to the time of the last act of malpractice. Thus, in New York state Surts, when the course of treatment that includes the wrongful act or omissions has run continuously and is related to the same original condition or complaint, the "accrual" comes at the end of the treatment.

The plaintiffs unsuccessfully rely on Kossick, which decided that federal law determines when the limitation period starts to run, even though state law determines if a mature cause of action exists as yet against the United States. The Court of Appeals, Second Circuit, in Kossick characterized the opinion of Judge Wisdom in the Fifth Circuit opinion in Quinton as powerfully reasoned and tollowed it as correct. However, Kossick does mention a continuous treatment doctrine, with the refinement that the postponement of the accrual of the claim does not continue during "merely occasional hospital visits at substantial intervals, and these for examination or minor treatment to alleviate sequelae of the injury rather than for further cure." 330 F.2d at 936 (where the continuous treatment doctrine was held not to apply to the plaintiff).

The facts in the case before us, giving them full favor for the plaintiffs, do not meet the purposes of the continuous treatment doctrine, which is meant to uphold the doctor-patient relationship.

The plaintiffs not only changed doctors after April 1971, but they also alternated between two hospitals. The best solution to such a situation is found in the Ninth Circuit case of Brown v. United States [353 F.2d 578 (9th Cir. 1965)]. The court explained that the reason for tolling is to give confidence in the doctor, for this confidential relationship excuses the making of inquiries into the care which has been or is being given, as long as the relationship continues. In Brown, the Ninth Circuit found that, even if the physician-patient relationship tolled the statute of limitations, the relationship ended when treatment by particular doctors at a naval hospital ended, even though the claimant was later treated by different doctors at another naval hospital. As for limitations in the Federal Torts Claim Act, "one who continues to receive treatment from succeeding government physicians is not, regardless of the circumstances, excused from conducting a diligent inquiry into conduct of the doctor with whom the personal relationship has terminated and who is not claimed to have acted in direct concert with succeeding physicians." Id. at 580. See also, Ciccarone v. U.S., 486 F.2d 253 (3d Cir. 1973). If a patient changes doctors and) nows of acts or omissions upon which his claim for negligence in a medical malpractice is based, he should not be allowed to forestall bringing suit until treatment for his injuries is complete. No other circuits have a more liberal rule, and some give less weight to the continuous treatment doctrine. Ashley v. United States, 413 F.2d 490 (9th Cir. 1969). It is unclear from the plaintiff's papers as to what period of time was spent on treating the meningitis, as compared to when the child was treated for rehabilitation from the effects of the disease. Although the latter may continue for many years, this medical treatment cannot be used to postpone the statute of limitations, without any conspiracy by the doctors to conceal the fact of negligence from the plaintiffs. In Brown, even though no government doctor had stated

that there had been negligent treatment of the child, the court found that facts sufficient to alert a reasonable person that there might have been negligence was afforded to the parents, and the claim accrued, when the parents were told that the child's blindness was a result of the excessive use of oxygen.

The plaintiffs' final argument is that they could not have reasonably discovered the malpractice before July of 1973, and the possibility of a misdiagnosis before June 1972. However, by April 1971, the plaintiffs knew that Dr. Marger had mistakenly diagnosed meningitis as being a cold, and at that time theil doctor-patient relationship with him had ended. The excuse of "blameless ignorance" does not apply here. See Urie v. Thompson, 337 U.S. 163 (1963). Even if the plaintiffs did not know what meningitis is, they should have asked the doctor if it was different than a cold. The plaintiffs also rely on the date of July 1973, which is when they were first advised by a lawyer, consulted for a different purpose, that they have a cause of action. This is clearly irrelevant as a basis to toll the statute of limitations. Similarly, the government is not required to advise the plaintiff of his right to sue. Also, the statute of limitations begins to run, even if a doctor does not admit specifically to negligence, as long as the plaintiff has knowledge of facts sufficient to alert a reasonable person that there may have been negligence; the plaintiffs here certainly had such knowledge. The statute of limitations is not tolled until the plaintiff seeks legal advice, but merely until the misdiagnosis is known.

The plaintiffs must realize that Dr. Marger did not cause the meningitis, but possibly he did breach his duty to make a careful examination and communicate a proper diagnosis to the plaintiffs. Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962). We do not know if the one-week delay in receiving a proper diagnosis aggravated any injuries caused by the meningitis, and the plaintiffs

do not make such an allegation. However, these questions need not be answered since, in my judgment, the plaintiffs did not make either a timely notice of claim or a timely commencement of the action.

The motion by the defendant United States of America to dismiss the plaintiffs' complaint is granted, and the complaint is hereby dismissed against it with prejudice.

It is so Ordered.

Dated: October 9, 1975

Albany, New York

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JOSEPH ARTHONY CAMIRE, infant by his father, JAMES ANTHONY CAMIRE and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MAIRE CAMIRE, Individually,

Plaintiffs,

NOTICE OF MOTION TO DISMISS COMPLATED

Civil No. 74-CV-501

- against -

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M.D.,

Defendants.

TO: HONORABLE JOSEPH R. SCULLY Clerk, U.S. District_Court Federal Post Office Building Albany, New York 12207

> Attorneys for Plaintiffs Main Street Keeseville, New York 12944

SIRS:

PIEASE TAKE NOTICE that upon the annexed Memorandum of Law of Richard K. Hughes, dated the Memorandum 1975, and upon all the papers filed and proceedings had herein, the undersigned will move this Court at a Motion Day thereof to be held at the U.S. Post Office and Court House, Albany, New York, on the 17th day of March, 1975, at 10:00 a.m., or as soon thereafter as Counsel can be heard, for a Judgment/Order, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissing the Complaint filed herein, for fasure to state a claim upon which relief can be granted, and for such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that opposing papers, if any, are to be served on the United States Attornay at least five days prior to the return date of the motion.

DATED: Albany, New York January 16 1975.

JAMES M. SULLIVAN, JR.
UNITED STATES ATTORNEY
Northern District of New York
Attorney for Defendant, United
States of America
U.S. Post Office and Court House
Albany, New York 12207

By Richard R. Mughes
Richard R. Hughes
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant by his father, JAMES ANTHONY CAMIRE and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, Individually,

Plaintiffs,

CIVIL NO. 74-CV-501

- against -

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M.D.,

MEMORATION OF LAS ATTEMPTO TO THOM MOTION

Defendants.

I. STATEMENT OF JUDICIAL PROCEEDINGS

plaintiffs' filing their verified complaint with the Clerk of the United States District Court on December 3, 1974.

An Assistant United States Attorney was personally served with a copy of the summons and verified complaint on December 4, 1974. Pursuant to Federal Rule of Civil Procedure 12(a), the time for the defendant UNITED STATES OF AMERICA, to appear, answer, or move with respect to the verified complaint will expire on February 3, 1975. Rule 12(a) further directs that service of the present motion to dismiss extends the time of defendant, UNITED STATES OF AMERICA, to answer until after disposition of this motion.

II. STATEMENT OF FACTS

According to the facts as alleged in plaintiffs' verified complaint, co-plaintiff infant, JOSEPH ANTHONY CAMIRE, was born to his parents, and co-plaintiff, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE, on or about November 27, 1970, at the Plattsburgh Air Force Base, Plattsburgh, New York.

This Air Force Dase is part of the Department of the Air Force, within the Department of Defense, an agency of defendant, UNITED STATES OF AMERICA.

The Complaint further alleges that the infant con was examined by defendant, CAPT. DONALD MARGER, M.D., a member of the medical staff of the hospital at the base, on or about April 15, 1971, for diagnosis of an ailment manifested by symptoms of "high fever, vomiting, convulsions, rigidity of neck muscles, and persistent crying." At that time, defendant, MARGER, allegedly diagnosed the malady as a combination of a common cold, and cutting teeth. The plaintiffs also allege that despite the continuance of these serious symptoms, further examinations of the infant plaintiff by defendant, CAPT. DONALD MARGER, M.D., resulted in the same diagnosis.

Plaintiffs allege that the final improper treatment of the infant plaintiff, by defendant, MARGER, occurred on or about April 22, 1971. April 22, 1971, accordingly, is the final date at which the alleged malpractice of defendant, MARGER, with respect to the infant plaintiff, could have occurred.

Upon his arrival in California later that same month, the infant plaintiff was examined by different medical personnel at the San Diego Naval Hospital, San Diego, California. At his admission on April 27, 1971, the plaintiff infant's maladies were immediately diagnosed as dehydration, meningitis, and seizures. A copy of said admission form is attached hereto as Exhibit 1. Paragraph ten of the verified complaint concedes, that upon the infant plaintiff's arrival in California in April, 1971, his

condition "was immediately diagnosed as an advanced case of meningitis." The plaintiffs do not allege any additional acts of negligence or malpractice by employees or agents of defendant, UNITED STATES OF AMERICA, occurring after April 22, 1971.

Paragraph fifteen of the verified complaint alleges that the plaintiffs initially filed an administrative claim with the Department of the Air Force on or about January 17, 1974. A copy of the standard claim form 95, is attached hereto as Exhibit 2, and an additional Notice of Claim is attached hereto as Exhibit 3.

It should be noted that in the plaintiffs' Notice of Claim, sworn to on the tenth day of December, 1973, at page two, plaintiff, GAIL MARIE CAMIRE, "[u]pon arrival at the San Diego Naval Base," (on or about April 26, 1971), "and after immediately taking said child to the San Diego Naval Mospital, ...was advised that the said child had an advenced case of spinal meningitis of approximately three to four weeks advance stage."

Said administrative claim was denied, on or about August 9, 1974, for plaintiffs' failure to file the administrative claim within two years, of the accrual of the cause of action, as required by Title 28, United States Code, Section 2401(b).

III. ARGUMENT

A. POINT I. THIS FEDERAL TORT CLAIMS ACT SUIT IS BARRED BY THE APPLICABLE FEDERAL STATUTE OF LIMITATIONS FOR FAILURE OF PLAINTIFFS TO PRESENT A UNITTEN ADMINISTRATIVE CLAIM TO THE UNITED STATES DEPARTMENT OF THE AIR FORCE WITHIN TWO YEARS OF THE ACCRUAL OF THE CIAIM.

Title 23, United States Code, Section 2401(b)(1966), directs:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The most recent acts of negligence of an employee of defendant, UNITED STATES OF AMERICA, one Donald Marger, M.D., allegedly occurred on or about April 22, 1971. Plaintiffs contend that at that time, Dr. Marger "Tailed to properly treat, classify, identify and diagnose the illness of the infant plaintiff; failed to take suitable steps which would insure the complete diagnosis; and failed to use basic medical tools in the evaluation, diagnosis, care and treatment of said infant." The plaintiffs allege no further or subsequent acts of negligence, or medical malpractice, on the part of any employees or agents of defendant, UNITED STATES OF AMERICA. The treatment of the infant plaintiff, JOSEPH ANTHONY CAMIRE, by the said Dr. Marger and the remaining medical personnel on the staff of the Plattsburgh, New York Air Force Base Hospital terminated sometime prior to April 27, 1971, when the plaintifflinfant was admitted to the Sun Diego, California Naval Hospital for treatment of meningitis. Plaintiffs allege. in paragraph ten, that the "came symptoms as previously reported to (defendant) Marger (were) immediately diagnosed as an advanced case of meningitis." Marger had allegedly previously diagnosed the plaintiff infant's condition as "cutting teeth and a cold."

It is clear, therefore, from the Complaint that plaintiffs on April 27, 1971 were aware of the alleged improper diagnosis and treatment of the infant plaintiff by defendant, Marger. They were then fully aware of the fact that the infant plaintiff had "an advanced case of meningitis" and not a common cold. It does not require special medical knowledge to know that the effect of meningitis can be, and often is, permanent paralysis. The fact that the disease was advanced and that different medical personnel at a different facility invediately diagnosed the condition and began proper treatment should be more than adequate notice to a potential claimant that the prior medical treatment may have been deficient.

It is well established in the majority of circuits that "federal law determines when a 'claim accrues' within the meaning of Section 2401(b)." That statute is not merely a procedural statute of limitations but "it imposes as a jurisdictional prerequisite to recovery, a substantive condition, qualification, a restriction on both the right and remedy of the plaintiff and on the suability of the United States."

Kossick v. United States, 330 F. 2d 933, 935 (2d Cir. 1964), cert. denied, 379 U.S. 837(1964). In Kossiek, supra., the Second Circuit followed the leading decision of Quinton v. United States, 304 F. 2d 234 (5th Cir. 1952). In Quinton, supra., at page 235, that Circuit, after ruling that federal law determined when the claim accrued, held that a malpractice action against the United States could only be maintained "within two years after the claimant discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his claim is based." [See also: Beech v. United States, 345 F.2d 872 (5th Cir. 1965), Hungerford v. United States, 307 F. 2d 99 (9th Cir. 1962), Coyne v. United States, 411 F. 2d 987 (5th Cir. 1969), Robinson v. U.S. Navy, 342 F. Supp. 381 (E.D. Pa. 1972), Ashley v. United States, 413 F. 2d 490 (9th Cir. 1969), Morano v. U.S. Mayal Hospital, 437 F. 2d 1009 (3rd Cir. 1971), and Brown

v. United States, 353 F. 2d 578 (9th Cir. 1965) .

It is also firmly established that the fact that the claim accrued during the minority of the plaintiff, JOSEPH ANTHONY CAMIRE, does not extend the federal statute of limitations. In Pattman v. United States, 341 F. 2d 739 (9th Cir. 1965), cert. dehied, 362 U.S. 941 (1965), the Circuit Court upheld the dismissal of the infant plaintiff's action by the District Court by ruling that neither the plaintiff's minority nor the absence of a guardian ad litem tolled the statute. (See also: Mann v. United States, 399 F. 2d 672, 673 (9th Cir. 1968), and Brown v. United States, supra., at page 579

B. POINT II. THE TWO YEAR PERIOD WITHIN WHICH TO FILE A WRITTEN ADMINISTRATIVE CLAIM IS NOT EXTENDED FOR PLAINTIFFS BY THE APPLICATION OF THE NEW YORK DOCTRINE OF "CONTINUOUS TREATMENT"

Plaintiffs appear to be attempting to circumvent the normal application of 28 United States Code Section 2401(b) by relying on the New York doctrine of "continuous treatment," originally annunciated in Borgia v. City of New York, 12 N.Y. 2d 151, 237 N.Y.S. 2d 319, 187 N.E. 2d 777(1952). Plaintiffs allege that the infant plaintiff, JOSEPH ANTHONY CAMIRE, had been under the care of the defendant, UNITED STATES OF AMERICA, up until February 16, 1973," within two years of filing the administrative claim. There are no allegations of any malpraetice during that period, nor even any allegations of contact with the defendant, Marger.

In Borgia, supra., the New York State Court of Appeals considered the issue of whether a claim accrues on the date of a negligent act or emission, or at the end of a continuous course of medical treatment by the accused hospital, (emphasis added), and decided in favor of the latter.

In Kossick, supra., at page 936, the Second Circuit considered the New York doctrine of continuous treatment but found it inapplicable to the plaintiff. This tolling of the statute would have expired when the plaintiff was last discharged and no further remedy could be effected. The Circuit Court further noted that it

"would be unreasonable to postpone the beginning of the limitation period so long as Kossick exercised his statutory right to demand further treatment at the Hospital, 42 U.S.C. Section 249-a period that will never expire so long as he is a scaman."

The present infant plaintiff was entitled to, and allegedly did receive governmental medical care during the period of active military service of his father, James A. Camire, which terminated on orabout February 16, 1973.

In denying the motion of the United States to dismiss
the complaint, District Judge Weinfeld, in his opinion in
Accardi v. United States, 356 F. Supp. 218, 222 (SDNY 1973),
noted that "the running of the statute of limitations is tolled
for the period during which he (the claimant) undergoes treatment for the injury and refrains from bringing suit."

After trial of this case, however, Judge Weinfeld determined that there was no additional treatment to the plaintiff's eye after September 8, 1965, (although the plaintiff had been rehospitilized from December 1965 to July, 1966), that the plaintiff discovered the negligent acts or omissions of defendant's employees or before December 31, 1965, and that since the suit was not filed until March, 1968, the action was barred irrespective of plaintiff's treatment by government physicians until July, 1966. Accardiv. United States, 372 F. Supp. 205(S.D.N.Y. 1974).

A case which seems clearly analogous to the present case, in which treatment by the elleged wrongdoor had terminated more than two years prior to the filing of the claim, is <u>Cicearone v. United States</u>, 486 F. 2d 253 (3rd cir. 1973). In affirming the judgment of the District Court dismissing the plaintiff's claim, the Circuit Court stated.

"On August 6, 1963, not only did the personal treatment of appellant by this individual physician cease
but there was no allegedly negligent activity by any
government physician after that date. Therefore,
August 6, 1963 was the date on which appellant's continuo i treatment terminated and his duty to dimpently
investigate the deleterious consequences of that treatment arose. His failure to pursue his remedy within
two years of that date operates as bar to recovery."

The doctrine of "continuous treatment" has been rejected by the Ninth Circuit Court of Appeals in AshJey v. United States, supra., at page 493, and Brown, supra., at page 530. The Circuit Court in Brown noted that the doctrine is to protect the patient-physician relationship. Once the relationship with the particular physician, terminates, the need for the protection similarly ceases.

The relationship between the patient, JOSEPH ANTHONY CAMIRE, and the physician, DONALD MARGER, M.D. terminated on or about April 22, 1971. On that date, the protection afforded by the doctrine of "continuous treatment" similarly terminated.

IV CONCLUSION

For all the foregoing reasons, the defendant, UNITED STATES OF AMERICA, requests that the plaintiff's Complaint be dismissed with prejudice for failure to state claims upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: Albany, New York January 16, 1975.

Respectfully submitted.

JAMES M. SULLIVAN, JR.
UNITED STATES ATTORNEY
Attorneys formDefendant, United
States of America
U.S. Post Office & Court House
Albany, New York 12207

Michael W. Maghes
Assistant U.S. Attorney

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EXhiBit 1

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CLAIM FOR DAMAGE, INJURY, OR DEATH

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CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

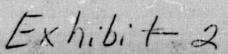
The claimant shall forfeit and pay to the United States the sum of \$2,000, plus double the amount of damages sustained by the United States. (See R.S. §3490, 5438; 31 U.S.C. 231.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than \$10,000 or imprisonment for not more than 5 years or both. (5:e 62 Stat. 698, 749; 18 U.S.C. 287, 1601.)

GENERAL SERVICES ADMINISTRATION-FPMR 101-11.8

STANDARD FORM 95 REVISED FIBRUARY 1971 GSA 1FMR 101-11.8



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In the Matter of the Claim of

JOSEPH ANTHONY CAMIRE, Infant, by his father, JAMES ANTHONY CAMIRE, and his mother, GAIL MARIE CAMIRE.

NOTICE OF CLAIM

-against-

TR. ALAN H. MITNICK, DR. DONALD MAPGER, THE PLATTSBURGH AIR FORCE BASE, SECRETARY OF DEFENSE OF THE UNITED STATES OF AMERICA, SECRETARY OF THE UNITED STATES AIR FORCE.

TO: Dr. Alan H. Mitnick, Dr. Donald Marger, The Plattaburgh Air Force Base, Secretary of Defense of the U.S.A., Secretary of the U.S. Air Force.

SIR:

PLEASE TAKE NOTICE that the claimants herein hereby make claim and demand against the above named as follows:

1. The name and post-office address of each claimant and of his attorney is:

JOSEPH ANTHONY CAMIRE Keeseville, New York 12944

LIVINGSTON L. HATCH, ESQ. Attorney At Law P.O. Box 296 Keeseville, New York 129-4

JAMES ANTHONY CAMIRE Keeseville, New York 12944

Same as above

GAIL MARIE CAMIRE Keoseville, New York 12944

Same as above

- 2. Insurance or other compensation: None
- 3. The neture of the claim; the time when, the place where and the manner in which the claim arose:

On November 27, 1970, Joseph Anthony Camire was born to Gail Marie Camire and James Anthony Camire at the Plattsburgh Air Force Base Hospital, in Plattsburgh, New York. James A. Camire, the father, was an k-3 in the United States Bayy who was rabsoquently discharged from military service on February 16, 1973. Gail Marie Camire was revisited with her mother in



Keeseville, New York, while James Anthony Camire was on a West Pack Crev in the Pacific.

During the month of April, 1971, and more specifically, on or about April 15, 1971, during the post-matal care of the said infant, one Dr. Ponald Marger, a Captain in the United States Air Force assigned to the medical detail for the Plattsburgh Air Force Base, saw the said infant who demonstrated the following symptoms: high fever, convulsions, crying and persistent crying. The said Dr. Marger diagnosed and treated the said infant for cutting teeth and a cold. Approximately three or four days later the infant had a convulsion at home and was running a temperature of approximately 103° and said information was transmitted to Dr. Marger at the Flattsburgh Air Force Pase on the second visit to the hospital. The same diagnosis as before was given by Dr. Marger.

On or about April 26; 1971, on a third visit with the same symptoms, Gail Marie Camire was advised that it was proper and medically safe to take her said child with her to San Diego. California. Upon arrival at the San Diego Neval Base, and after immediately taking said child to the San Diego Naval Hospital. Gail Marie Camire was advised that the said child had an advanced case of spinal meningitis of approximately three to four weeks advance stage.

Since that date the child has been parelyzed and unable to care for bimself or develope as a normal child.

- 4. Acts of negligence claimed:
- a) Pailure to diagnose;
- b) Failure to properly treat; and
- c) Failure to inform the authorized and responsible person of the extent and nature of the pessible menical complications, diagnosis and promosis.

5. Amount claimed: JOSEPH ANTHONY-GAMINE claims pain and suffering, loss earnings and all incidents of damage relative to the acts of negligence described above, in the amount of Two Million Dollars (\$2,000,000.00). JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE claim damages in the amount of Two Million Dollars (\$2,000,000.00), separate and above the damages claimed by JOSEPH ANTHONY CAMIRE.

The foregoing statement is made under the penalty of perjury and the foregoing is stated on the best information and belief and on personal knowledge of the facts as known by the claimants.

Dated: November 30, 1973.

Respectfully yours,

s/ James Anthony Camire
JAMES ANTHONY CAMIRE, Claimant

s/ Gail Marie Camire
CAIL MARIE CAMINE, Claimant

STATE OF NEW YORK

88.

CAIL MARIE CAMIRE, being duly sworm, deposes and eays; that the is the claimant herein; that she has read the foregoins notice of claim against Dr. Alan H. Mitnick, Dr. Donald Marger, the instaburgh Air Force Base, the Secretary of Defense of the Unit a States of America, the Secretary of the United States Air Force, and knows the contents thereof; that the same is true to her man knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matter she relieves it to be true.

s/ Gail Marie Camire

GAIL MARTE CATTRE

Swarn to before me this 10 day of December, 1973. s/ Diama J. Matyi (Hethaway)

Rotury Mille

STATE OF CONNECTICUT

COUNTY OF

88.:

JAMES ANTHONY CAMIRE, being dul; sworn, deposes and says; that he is the claiment herein; that he has read the foregoing notice of claim against Dr. Alan H. Mitnick, Dr. Donald Morger, the Plattaburgh Air Force Base, the Ferrstary of Defense of the United States of America, the Secretary of the United States Air Force, end knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matter. he believes it to be true.

> s/ James Anthony Camire JAMES ANDRONY CARRE

Sworm to before me this 14thday of December, 1973.

s/ Caetaro Bartomioli

Notary Public

LIVINGSTON I. HATCH

ATTORNEY AT LAW

FRONT STREET ESSEX ROAD

KEESEVILLE NEW YORK WILLSBORD, NEW YORK
12944 12996

WILLSBURG SIA- HEZZA WILLSBURG SIA-1177-1179

January 14, 1974

Plattsburgh Air Force Base c/o Base Commander Plattsburgh, New York

Secretary of Defense Washington, D.C. Attention: Federal Tort Claims Department

Secretary of U.S. Air Force Washington, D.C. Attention: Federal Tort Claims Department

Dr. Alan H. Mitnick 6210 Park Heights Avenue Baltimore, Maryland 21215

Dr. Donald Marjer 85 Centinnel Hill Road Milford, Connecticut

Re: Federal Tort Claims Camire v. U.S. of A.

To the above named:

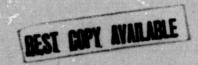
Enclosed herewith is Notice of Claim.

Very truly yours,

Livingston L. Hatch

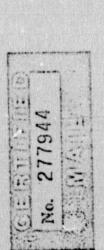
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Lill: eah Enclosure



LIVINGSTON L. HATCH
ATTORNEY AT LAW

RONT STREET
RELEVILLE, NEW, YORK
1994



Secretary of United States Air Force Washington, D.C.

ALL'A

Att.: Federal Tort Claims Department

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UNITED STATES DISTRICT COURT WORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant by his father, JAMES ANTHONY CAMIRE and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, individually,

Plaintiffs,

Civil Action

-against-

UNITED STATES OF AMERICA and CAPT. DOMALD MARGER, M.D.,

Defendants.

Su. Motis

YOU ARE HEREBY summoned and required to serve upon the plaintiffs' attorney, Livingston L. Paten, Tar., Pain Street, Keeseville, New York, an answer to the complaint which is herewith served upon you, within 60 days after the nervice of this summons upon the United States Attorney for the Northern District of Lew York, exclusive of the day of service. If you fail to do so, judgment by default will be talen against you for the relief demanded in the complaint.

LlVILIGHTON L. MATCH, P.S. Attorney for Plaintiffs Office a p.O. ddress Main Street Keeseville, Jew York 17744 (518) 834-7518

Attorney General of the United States Washington, D.C.

United States Attorney for the Northern District Albany, New York

United States Air Force Washington, D.C.

1.

1.

Capt. Donald Warger, M.D. 85 Centinnel Hill Road Milford, Connecticut

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant by his father, JAMES ANTHONY CAMIRE and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, individually,

Civil Action

Plaintiffs,

COMPLAINT

-against-

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M.D., Defendants.

AS AND FOR A FIRST CAUSE OF ACTION ON BEHALT OF PLATITIFF JOSEPH ANTHONY CAMELS

- 1. This action is brought under the Federal Tort Claims
 Action 28 U.S.C. Sections 1546 (b) and 2.71 et son. A Terminafter more fully appears. The plaintiffs are ditizens of the United States of America and one of the defendants is the United States of America and one of the defendants is the United States of America. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousant Dollars (515,000.00) in respect to each of the plaintiffs.
- 2. Joseph Anthony Camire is an infant under the tre of fourteen years and is the son of sames Anthony Camire and Gail Marie Camire and the said infant is dependent upon fonce Anthony Camire and Gail Marie Camire for support and maintenance.
- 3. That James Anthony Comire and Call Large Camire are the parents and natural guardians of Juneah Anthony Comire and bring this action on his behalf and individually.
- 4. That on or about Lovember CY, 1979 Joseph Anthony Camire was born to James Anthony Comire and Gail James Camire at the Plattaburgh Air Force Labe in Plattaburgh, Ira Youk. The Plattaburgh Air Force Pape was and still is a most of the under the direction and control of the Air Fire of the Fried Captes.

3/

of America. The said Air Force Base is a part of the United States Government and is a military installation under the direction and control of the United States of America.

- 5. At the above-mentioned time and up until February 16, 1973, James Anthony Camire, the father of Joseph Anthony Chaire, was an E3 in the United States Navy. Gail Marie Graine and Joseph Anthony Camire were dependents of James Anthony Camira who was a member and employee of the United States of America.
- 6. That Capt. Donald Margor, M.D., was assigned to the Plattsburgh Air Force Base medical detail. That exact times hereinafter mentioned, Capt. Donald Margor, M.D., ected within the scope of his authority and as an employee of and a post of the United States Air Force and an employee of the United States Air Force and an employee of the United States of America. The said acts were performed within the content of his office and employment and after the inferior pharmacount been duly admitted to the care and custody of the United States Government.
- care of the said infant, Joseph Anthony Comire, the plainties.

 Gail Maire Cemire, who had privileges to cepk middent attended at the Plattsburgh Air Force Base, did take the said infant to the hospital and was duly admitted for examination by one Seeb. Decade to the medical detail for the Plattsburgh Air Force Face. At this time the said infant demonstrated, exemp offer thing, the following symptoms: high fever, veniting, convolutions, admitted of neck muscles and persistent crying. Supt. Devald Faces. A.D. diagnosed and treated the said infant for outling to the populations, admitted

- 8. That approximately three or four days later, plaintiff, Gail Marie Camire, returned to the Plattaburgh Air Force Base hospital and related to Capt. Donald Marger, M.D., the present condition of the said infant. Capt. Donald Marger treated and diagnosed the said infant as cutting teath and a cold.
- 9. Thereafter and on or about April 22, 1971, plaintiff, Gail Marie Camire, returned to the said hospital and related the same symptoms to said Capt. Donald Marger, M.D., and requested, advice concerning travel of the said infant. Capt. Donald Marger, M.D., continued his diagnosis as cutting feeth and a cold and advised that the trip to California would not be medically harmful to the infant.
- Hospital in Palboa, California, the infant sustained a convulsion and exhibited the same symptoms as previously reported to Capt.

 Donald Marger, M.D., and was immediately diagnosed as an advanced case of meningitis. The exact type of meningitis was undiagnosed due to the advanced stage of the illness. Since that time and up until February 16, 1975, the infant plaintiff and been under the care of the defendant, the United States of America.
- 11. The plaintiffs were free from con ributory regligence and were without fault as to the care and conditions of the infant plaintiff, and the defendant, the United States of America, is solely responsible for the acts of hegligence, corelessness and wilfull disregard to good and proper medical prestment.
- 12. The plaintiffs claim that the defendant, the United States of America, through its agents, servents and caployees, and defendant, Capt. Donald Marger, M.D., were negligent and careless in the following manner, but not necessarily limited to the following:

failed to properly treat, classify, identify and diagnose the illness of the infant plaintiff;

failed to take suitable steps which would incure the complete diagnosis;

failed to use basic medical tools in the evaluation, diagnosis, care and treatment of the said infant;

improperly diagnosed the said infant's true illness.

- 13. As a result of the defendants' negligence, the infant plaintiff was rendered sick, sore, lame and totally disabled. These said personal injuries are of a permanent nature and have and will prevent him from living a normal like and sauce him to suffer great pain of the body and mind and to incor medical expenses. The said infant has been demaged in the amount of Two Million Dollars (32,000,000.00).
- 14. That at all times bersinafter mentioned, defendant, Capt. Donald Marger, was regularly in the service and employ of the Department of the Air Force of the United States of America, and was acting within the scope of his office and employment.
- 15. That the infant plaintiff was under the continuous amedical treatment of the defendant, the United States of Emerica, until on or about February 16, 1973. In That on or about January 17, 1974 a claim was filed with the United States Air For e on behalf of the plaintiffs and the said claim was denied by the Department of the Air Force on August 9, 1974 and this suit was duly commenced within six months of the denial of such claim.

AS AND FOR THE SECOND CAUSE OF ACTION OF DEPART OF PLAINTIFFS

- Marie Camire, repeat, reiterate and reallege each and every allegation contained in paragraphs "1" to and including "15" of this complaint as if more fully set forth herein.
- 17. That at all times hereinafter mentioned, plaintiffs, 'James Anthony Camire and Gail Marie Camire, were and still are

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the mother and father of Joseph Anthony Comire, an infant under the age of fourteen years, and as such is entitled to the earnings; service, society and aid of their son.

18. That as the result of the negligence of the defendants, the plaintiffs, James Anthony Camire and Cail Marie Comire, suffered the loss of services, the loss of earnings, and suffered mental anguish and were compelled to expend large sums of money on behalf of said infant plaintiff for medical treatment, hospitalization, drugs, x-rays, nursing and convelescence, and were and will be deprived of the earnings, society, services and aid of their son.

19. By reason of the foregoing facts, blockiffs, dames Anthony Camire and Goil Marie Comire, demand finigrant against the defendants in the sum of Two Million Dollars (02,000,0 0.00).

MIEREFORE, plaintiffs decand judgment arribet the defendants on the First Cause of Action in the amount of Two Million Dollars (\$2,000,000.00), and plaintiffs, Jones Anthony Profession and Sail Marie Camire, demand Judgment agrainst the Mierican the Second Cause of Action in the amount of Two Million Dollars (\$2,000,000.00), together with the costs and discurpendant on each of these causes of action.

LIVINGSTON 1. NATON, 1.3.
Autorney for Fleintiers
OUFICE & P.O. ADDATES
Village Officer Tivic Center
Koeseville, 100 York 18944
(516) 856-7518

STATE OF NEW YORK COUNTY OF CLINTON

JAMES ANTHONY CAMIRE and GAIL MARKE CAMIRE, being daily sworn, deposes and say that deponents are the plaintilife in the within action; that deponents have read the foregoing complaint and know the contents thereof; that the same is true to dear ents; own knowledge, except as to the natters therein attend to be alleged on information and belief, and that as to those natters deponents believe it to be true.

Ant M. Commen

Sworn to before me this 9th day of Colones, 1974.

Amosta Blotal

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant, by his father, JAMES ANTHONY CAMIRE, and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, individually,

Plaintiffs.

-against-

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M.D.,

Defendants.

AFFIDAVIT

STATE OF NEW YORK COUNTY OF ESSEX

Gail Marie Camire, being duly sworn, deposes and says:

- 1. She is one of the plaintiffs in the within action and is fully familiar with all the facts and circumstances surrounding the within action. Your deponent is the wife of the plaintiff James Anthony Camire and is the mother of the infant plaintiff Joseph Anthony Camire. Your deponent was bern September 1, 1950 and was twenty years of age in April of 1971.
- 2. Your deponent has no formal medical training nor has your deponent ever taken any course in pre-natal or post-natal care of an infant. Your deponent went to the twelfth grade at the Ausable Valley Central School. Although your deponent has been around children and babysat during her adolescent years, she has had limited experience in the care and treatment of children prior to her giving birth to plaintiff Joseph anthony Cumire.
- 3. Your deponent states that on November 27, 1970, plaintiff Joseph Anthony Camire was born at Plattsburgh, New York. While your deponent's husband was on a Westpack Cruise in the Pacific, her needs and those of her child's medical needs were

taken care of at the Plattsburgh Air Force Base in Plattsburgh,
New York, while your deponent was in this area. Annexed herete
and made a part of this affidavit is a copy of the medical records.

marked Exhibit A. Your deponent states that about September 23,
1974 was the first time she had occasion to see these records.

These records were obtained by your deponent's attorney,
Livingston L. Hatch. Esq. Your deponent states that those
medical records represent part of the course of treatment which
was offered to the infant plaintiff. Your deponent states that
there are portions of these records that are missing and your
deponent will offer testimony relative to the missing records.

4. On April 27, 1971, your deponent's infant son was admitted to the Balboa Naval Mospital in San Diego, California. Your deponent states that in order to obtain admission to the hospital, a form was filled out. Your deponent calls the Court's attention to Exhibit A, page 45, items 26 and 28. Your deponent states that items 26 and 28 show that the diagnosis was undetermined and there was no mention of how or where that condition was caused. Your deponent states that a review of the medical record shows that the doctors at the Balboa Naval Mospital did not have the infant plaintiff's records as of July 13, 1971. (See Exhibit a, page 39.)

5. Your deponent states that while she was having the infant treated at the Plattsburgh Air Force Base, her normal pediatrician was Capt. Metnick, M.D., although on occasions Capt. Donald Marger, M.D., offered certain medical treatment. Your deponent states that the medical records, through inadequate, show the course of treatment of this infant at the Plattsburgh Air Force Base before and during April of 1971. At the time

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the infant was being treated by Capt. Donald Marger, M.D., your deponent had no reason to believe that Capt. Donald Marger's advice, diagnosis and course of medical treatment was wron. Your deponent was assured by Capt. Donald Marger, M.D., that she would have to be patient because the teeth-cutting episode could last for a period of time. Your deponent was also informed that it was safe to fly with the infant plaintiff to California on April 26, 1971. The infant was cutting teeth.

6. Your deponent states that when she arrived at the Balboa Naval Hospital with her infant son, she was advised in the emergency room that the child was very sick and that they suspected meningitis. The U.S. Attorney makes the diagnostic process at the Balboa Naval Hospital sound so simple. A review of Exhibit A will show that the true nature of the meningitis was not able to be evaluated because of the masking by antibiotics; Your deponent states the sequence be events were much more involved than the notice of claim or the complaint would indicate. When your deponent brought her infant son to the emergency room at the Balboa Naval Hospital, she stood on line and was finally taken out of order by Dr. Campbell. The emergency room doctor examined the infant without my being present. He came to me in a short period of time and indicated that they suspected that the child had meningitis. There was no mention at that time as to the stage of the meningitis. The only thing that was mentioned was that the child should be baptized and given the Last Rites. Your deponent states that the medical records clearly show that the medical facility of Balboa was not sure what type of meningitis it was. Your deponent spent a great deal of time, as the medical records will show, at the hospital and actively engaged in the

curative activities and rehabilitative process of the infant plaintiff. Your deponent knew nothing of improper diagnosis, misdiagnosis, or even the likelihood of making a claim against the government for negligence. Your deponent had no knowledge of the existence of a claim until approximately July 10, 1973.

- 7. Your deponent states that in June of 1972 she returned East with the infant plaintiff and went on June 6, 1972 to the Plattsburgh Air Force Base for further care and treatment relative to the sequel of injuries related to the acts of negligence by the Plattsburgh Air Force Base Hospital. At that time your deponent's child was treated by Dr. Metnick. Your deponent then took the infant child to civilian medical personnel. Your deponent was advised to see Dr. Jerome Davis of Plattsburgh, New York. The infant plaintiff went through a series of tests and referrals to various doctors. During the conese of the medical workup, Dr. Jerome Davis indicated to your deponent that the infant child was apparently suffering from untreated meningitis and that the existence of this condition undetected for a long period of time cause the debilitation. Your deponent states that this was the first time that she had any knowledge that the child suffered from undiagnosed meningitis and that there may have been something wrong in the diagnostic process. Annexed hereto and made a part of this affidavit is a copy of Dr. Davis' medical report - marked Exhibit B.
- 8. Your deponent has a brother by the name of Arnold
 Lincoln who was injured in a logging accident and who retained
 the services of Attorney Livingston L. Hatch, of Keeseville,
 New York. Your deponent was requested to come to his office to
 assist him in preparing certain Workmen Compensation papers and
 preparing for a hearing. Later on Attorney Hatch came to the
 home in which I was living in Keeseville to drive my brother
 to a compensation hearing. At that time your deponent discussed
 this matter with Att rney Hatch and showed him her infant son

and the teeth cutting wedicine that Capt. Donald Marger, M.D., prescribed. On July 10, 1973 Attorney Hatch asked me to come to his office to discuss this matter with him. A. that meeting Attorney Hatch went through the course of treatment that your deponent received at the Plattsburgh Air Force Base. Attorney Hatch asked your deponent questions concerning the physical appearance of the infant and exactly what Dr. Marger did in examining the infant. Your deponent was requested to sign a medical authorization to permit Attorney Hatch to obtain copies of the medical records. On that day your deponent was advised by Attorney Hatch that the initial diagnostic test for determining the existence or the probability of meningitis were relatively simple and that it appeared from what your deponent told Attorney Hatch that there was a misdiagnosis in this case. Your deponent gave to Attorney Hatch the only medical records that she had in her possession. Annexed hereto and made a part of this affidavit is a copy of those records - marked Exhibit C. Your deponent states that she was unaward of any improper handling of the lufant son until she was advised by another doctor and by an attorney that there was a possiblity of a medical malpractice claim.

9. Your deponent was informed by her attorney that she was unable to locate medical records at the Plattsburgh Air Force Base or anything to indicate the course of treatment in this matter. Your deponent was asked to execute a notice of claim.

Annexed hereto and made a part of this affidavit is a copy of the executed notice of claim with proof of mailing on January 15, 1974 - marked Exhibit D. Your deponent states that those papers were not drawn verbatim as your deponent dictated them, but rather were drawn by the attorney and executed by the plaintiffs after review of the same. Your deponent states that those papers do not have all the dates, times, events and the course of events

BEST COPY AVAILABLE

as to the day-by-day, hour-by-hour course of treatment in dealing with the sick infant child. Your deponent states that she was informed that on August 9, 1974 her attorney received a denial from the United States Air Porce and that the denial of the claim was not on the basis that there was no negligence, but rather that there was an untimeliness in filing the notice of claim. There was no denial as to the facts as they are spelled out in this letter dated August 9, 1974 from Col. William A. Martin. Annexed hereto and made a part of this affidavit is a copy of the letter dated August 9, 1974 - marked Exhibit E. On August 20, 1974, your deponent's attorney directed a response to the denial letter of which no answer or reply has been had from the U.S. Government. On or about December 4, 1974, the verified complaint was served on the U.S. Government and on January 27, 1975 the verified complaint was served on Capt. Donald Marger, M.D. Annexed hereto and made a part of this affidavit is a copy of the summons and complaint in this matter - marked Exhibit F. Your deponent states that she had no knowledge that a medical malpractice case existed until July of 1973 and that her first knowledge concerning a possible misdiagnosis was in June of 1972.

- 10. Your deponent states that to apply the statute of limitation against the infant plaintiff in a mechanical manner will result in irreparable harm and injustice to a severely damaged child.
- 11. No previous application for relief of a similar nature has been made.

WHEREFORE, your deponent respectfully requests that the Court grant the relief sought in the annexed notice of motion, and such other and further relief as the Court does just.

Sworn to before me

slomost Delet.

SAIL MARIE CAMINE COMINES

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-6-

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infont, by his father, JAMES ANTHONY CAMIRE, and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, individually,

Plaintiffs,

-against-

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M.D.,

Defendants.

ATTORNEY'S AFFIDAVIT

STATE OF NEW YORK COUNTY OF ESSEX

ss.

Livingston L. Hatch, being duly sworn, deposes and says:

- i. That I am the attorney for the plaintiffs in the within action and fully familiar with the facts and circumstances which have been gathered by interviews with the plaintiffs and inspection of the records and conversations with personnel at the Plattsburgh Air Force Base, Plattsburgh, New York.
- 2. Your deponent represents one Arnold bincoln, brother of plaintiff Gail Marie Camire. Arnold bincoln suffered a severe head injury in a logging accident which resulted in total disability. Your deponent needed to obtain certain information about his education and social background in order to aid in preparing for a Workmen Compensation hearing. Your deponent requested that one of the members of the family he present to assist in the communication and the gathering of information.

 After your deponent had spoken to plaintiff Gail Marie Camire relative to Arnold Lincoln's situation, your deponent had a conversation with plaintiff Gail Marie Camire about the possibility of collecting Social Security Disability and Aid to Dependent for the infant. Children from the Department of Social Services, Your deponent

asked plaintiff Gail Marie Camire the history of how this situation developed. At that time there was no further conversation concerning the facts surrounding the medical treatment at the Plattsburgh Air Porce Base. Your deponent went to the plaintiff's residence to pick up Arnold Lincoln for a compensation hearing. At that time your deponent had a further conversation with plaintiff Gail Marie Camire at which time she showed me some feeth cutting medicine and her infant son who could neither pick his head up nor move about in his crib. Your deponent went into great details to determine what this whole situation was about. Mrs. Camire indicated to your deponent that in June of 1972 Dr. Jerome Davis indicated that this was a case of untreated meningitis. Your deponent received a medical authorization from the plaintiffs and went to the Plattsburgh Air Force Base and then 'to the Champlain Valley Physicians Hospital in Plattsburgh, New York. Your deponent discovered that the Plattsburgh Air Force Base either did not know or refused to give information as to the whereabouts of Capt. Donald Marger, M.D. Your deponent discovered in the medical records at Champlain Valley Physicians Hospital the statement concerning the untreated meningitis. Your deponent prepared a claim after a number of attempts to secure the infant's medical records and file the same in January of 1974 within approximately six months from the discovery of the medical malpractice case.

3. Your deponent states as an officer of the courts of the State of Nev York that these plaintiffs knew nothing about the existence of a cause of action until the conversation of July of 1973. The only thing that these plaintiffs knew was that

their infant son required care and treatment in order to alluviate the injuries and the pain from his improper diagnosis and the results therefrom.

- 4. Your deponent takes two positions in arguing that a statute of limitation is not applicable to this case. First: your deponent argues that the infant was constantly under the care and treatment of the United Stat : Government for the injuries sustained at the Plattsburgh Air Force Base up until Pebruary of 1973. Second: Your deponent takes the position that the plaintiffs did not discover the true nature of the misdiagnosis until July of 1973, or in the exercise of reasonable diligence they did not discover the misdiagnosis until July of 1973. Taking these two positions into consideration, the filing of the notice of claim in January of 1974 makes the claim timely.
- 5. That no previous application for relief of a similar nature has been made.

WHEREFORE, your deponent respectfully requests that the Court dismiss the motion for summary judgment, and such other and further relief as the Court deems just and proper.

Strongston BHatch

Sworn to before me this

abik day of August, 1975. S/Dianne Halpanan Notary Public

45

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant, by his father, JAMES ANTHONY CAMIRE, and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, individually,

Plaintiffs.

-against-

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M.D.,

Defendants.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF ESSEX

ss.:

James Anthony Camire, being duly sworn, deposes and says:

- 1. That I am one of the plaintiffs in the within action and familiar with some of the facts and circumstances surrounding the same.
- 2. Your deponent was twenty-three years of age in April of 1971 and was a member of the U.S. Navy. Your deponent was not present in Plattsburgh, New York, when this misdiagnosis occurred nor was he present at the Balboa Naval Hospital in San Diego, California, during the initial period of the care and treatment of the infant plaintiff. Your deponent arrived at the Balboa Naval Hospital on or about May 10, 1971. Your deponent did not take part in any of the military medical treatment nor was he aware of what had transpired except what he was told by his wife.
- 3. Your deponent had no idea that there was a claim until July of 1973 when he discussed the matter with Attorney Livingston L. Hatch and at that time he gave Attorney Hatch permission to pursue this to determine the exact nature and the possibility of a course of action against the United States Government.

4. No previous application for relief of a similar nature has been made.

WHEREFORE, your deponent respectfully requests that the Court dismiss the defendants motion for summary judgment, and such other and further relief as to the Court may seem just and proper.

JAMES ANTHONY CANTILLE

Sworn to before me this 26 day of August, 1975.

Amgata Bollach

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Standard Form 309



January 26, 1972

P. J. Goscienski, M. D. CDR MC USN Pediatric Service Balboa Naval Hospital San Diego, California CERTIFIED TO BE A TRUE COPY

J. S. SHOWALTER

LIEUTENANT, JAGO, USNR STAFF L'UDGE ADVOCATE

NAVREGMEDCEN

SAN DIEGO, CA 92134

RE: 37-PJG:bfs 6150 17 December 1971

Dear Dr. Goscienski:

Enclosed is the note of the initial evaluation on Joseph H. Camire. The mother and child would benefit from involvement with the Therapy Department and an evaluation by the Speech and Hearing Center at Children's Hospital. I would be glad to follow through with supervision of these services.

I would suggest that your department continue managing Joseph's seizure disorder and medication rather than in erject my thoughts at present. The mother approves of such an arrangement.

I have sent a referral letter to the Regional Center to become involved when the waiting list permits.

Follow-up notes will be forwarded to your office for his medical chart at Balboa. Thank you for this referral, if further questions arise, please do not hesitate to contact me.

Sincerely,

John F. Eislers

John E. Eisele, M. D. Director of Rehabilitation

JEE: sc

Enclosure

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January 3, 1972

P. J. Goscienski CDR MC USN Pediatric Service Naval Hospital San Diego, California 92134 CERTIFIED TO BE A TRUE COPY

J. S. CHOWALTER
LIEUTENANT, JAGO, USNR
STAFF JUDGE ADVOCATE
NAVREGMEDCEN
SAN DIEGO, CA 92134

RE: 37-PJG:bfs 6150 17 December 1971

Dear Dr. Goscienski:

In regard to your inquiry concerning Joseph A. Camire, I would offer the following information.

Children's Health Center and the Regional Center for the Mentally Retarded offer a variety of programs both diagnostically and therapeutically. In addition, the Neurologic Diagnostic Clinic is available if the diagnosis were open to question. Therapists and other allied health personnel are skilled and experienced in the management of pediatric level problems of both the physically and mentally handicapped child.

For this particular patient I would suggest the following. I would be glad to evaluate this boy on an outpatient basis along with an Occupational and Physical Therapist. Depending on his circumstances, we could then provide for an ongoing care program including the management of his seizure disorder if you so desire, through this facility. In all likelihood, he will merit a referral to the Regional Center for counselling and ultimately for optimum utilization of the available community resources. As their waiting list is approximately 700 patients, we can at least get a program inaugerated through a visit with me.

If the above meets with your approval, kindly have Mrs. Camire call my office at 277-5808 Ext: 363 to arrange an appointment. We have tentatively set up January 11, 1972, 1:00 p.m. for their appointment.

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JOSEPH H. CAMIRE BD: 11/27/70 69-063

CONSULTATION REPARTION EVALUATION CONSULTATION PAge 1

Signature of Consultant

Note Findings and Recommended Treatment.	13 month old boy from La Mesa, California
	is being evaluated at the request of Dr. P.J.
Goscienski of Balboa Naval Hospital.	The request of br. F.J.
Process Manager de la constant de la	
	when the child had a febrile illness, becare
	diagnosed as having bacterial meningitis.
No specific organism was recovered as t	he cultures were masked by pre-L.P. antibiot
	s incomplete leaving obvious sequelae of bra
damage. He was discharged to home with	out-patient follow-up care that has centered
largely on his persistent seizure disor	der. He began initially on phenobarb, progr
	mg. Mephobarbital B.I.D. 2cc Dilantin suspen
B.I.D. and 2.5 cc of Mysoline, B.I.D.	
The mother notes weakness and stiffness	in his right side. He uses his left hand
for grasp but with little purposeful ac	tivity. He seems aware of light and dark
	hearing is impaired but he does respond to
	s father's voice. His only communication is
	bled sylable. He does not sit without support
and he has not attempted standing or am	
Prior to the onset of the meningitis, h	e was thought to be healthy and normal. The
birth and neonatal history were unremar	
There are no current complaints other the	han relative to his neurologic residuals.
	M.D

REHABILITATION EVALUATION

CONSULTATION

JOSEPH H. CAMIRE

January 19, 1972 Date: Page 2. Stencil Patient Data Hero ote Findings and Recommended Treatment:_ Examination reveals a well formed child of average height and weight in no acute distress. Ht: 30" Wt: 19 1bs. 6 oz. FKIN: Unremarkable. HEAD: Normacephalic, no bruit noted. Pupils equal and reactive to light., Fundi, normal. Disks pysiologically EYES: cupped and normal color bilaterally. conjugate gaze. No attention to hand or finger movements in front of face. Responded to fundus exam with blink: EARS: TM's Pearly. Symmetrical muscles of expression CERTIFIED TO BE A TRUE COPY FACE: MOUTH: Throat benign. Normal palate. NECK: Supple, no masses. CHEST: Symmetrical and clear. STAFF JUDGE ADVOCATE BEART: NSR, no murmurs. SAN DIEGO, CA 92134 Soft, no LSK or masses. AEDOMEN: ENITALIA: Infant male. Both testes in scrotum. : Straight spine. Slightly asymmetrical muscles with more bulk on the right. BACK RUE: Moderate spasticity. Hyperactive reflexes. Mostly flexor activity. voluntary extensor activity. Primitive grasp. LUE: Mild spasticity. More normal gramp. Hyperactive reflexes. Moderate spasticity. Hyperactive reflexes. Good extensor strength. RLE: cooperation, LLE: Mild spasticity. Hyperactive reflexes. Good voluntary motion. NEUROLOGICAL: D.T.R.'s noted above. sensation probably intact bilaterally, difficult

M.D.

JOSEPH H. CAMIRE

REHABILITATION EVALUATION

CONSULTATION

PAGE 3:

Date:	January	19.	1972
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play activities.

Stencil Patient Data Here

Note Findings and Recommended Treatment: to test. Babinskis positive bilaterally. No A.T.R. noted. Poor head control. No sitting balance. Suggestions of movements of head and left arm. No verbal response. athetoid social response. MOTHER: Relaxed and helpful throughout the evaluation. Realistic in her attitude Anxious to have therapuetic activities to carry on at home. IMPRESSIONS: Organic brain damage, secondary to meningitis, severe, stable. Spastic quadraparesis, right greater than left, moderate, stable. 2. 3. Impaired intellect, severe, probably permanent. Functional blindness, cortical, light perception only. 5. Functional deafness, cortical, severe. Seizure disorder, organic, partially controlled. Rule out early agetoid component. Stable family and well adjusted mother RECOMMENDATIONS OT, and PT assessments this date. Include ROM, reflex activity, developmental status, overall muscle picture. Schedule Speech and Hearing evaluation in approximately 2 wks. THERAPY RECOMMENDATIONS

He should be seen 1 x wk in OT and PT to continue his developmental assessment

and to provide a home program for the mother to emphasize ROM and developmenta.D.

Signature of Consultant

REHABILITATION EVALUATION

Date: January 19, 1972

CONSULTATION

JOSEPH H. CAMIRE

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Note 1	Findings and Recommended Treatment: He needs a great deal of tactile input be	aue
	because of his sensory deficits and limited contact with the environment.	
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	evaluation with potential addition of oral facilitation.	
3.	Re-evaluate after two mos. of the above with Dr. Eisele.	
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PLATE 80, 12947

Standard Form 509 (Rev. August 1954) Buresu ed the Budget Circular A-32 M.A. C. 11367 S/N 0109-201-2204 ---- CLINICAL RECORD **DOCTOR'S PROGRESS NOTES** (Sign all notes) DATE LIEUTHANT, JAGO, JUENR SAN D.ECO, CA 92134 PED CLINIC DEC 8 HILL MIC, USA 7. J. CORO. F/4 meningitis of und okol. at ago began having series -.. reids, not wally sleepy has never fried movement of riside to organs + shadows : does not respond

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BOCTOR'S PROGRESS NO Standard Form 109

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CLINICAL REC	ORD	CONSULTATION	SHEET
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37-PJG:bfs 6150 17 December 1971

John Eisele, M.D. Children's Health Center 8001 Prost Street San Diego, California 92123

Dear Dr. Eisele:

I would like to inquire about a program of comprehensive care for Joseph A. Camire. Joseph is a 13-month-old white male who was hospitalized in April, 1971 for meningitis of unknown etiology. (This was thought for a time to have been due to tuberculosis, however, skin tests have been negative and cultures have been unrevealing. He is not on antituberculous medication and has no sign of infection.

Joseph now has a multiplicity of sequelae which I feel would benefit from a program of care in your clinic. His visual acuity and audio-acuity are both markedly diminished. His development is far below normal, and he is functioning at about three-month level. He has some residual weakness of the right arm and leg. During the past two months, he has developed a seizure disorder which is only partly controlled by Phenobarbital and Dilantin. I have only recently begun seeing him (the family had moved out of town for awhile), and I feel that his seizure disorder will improve with appropriate medication.

I would like to continue to follow this child, but we do not have facilities at this hospital for appropriate testing of children at this age, and I have been disappointed in previous attempts at obtaining physiotherapy for children with this kind of problem. I would like very much to know if your center can provide diagnostic and therapeutic facilities for this markedly neurologically handicapped child. If I can find a hospital summary, I shall send you a copy. I will also send you a copy of my latest note to supplement the above prescription. Thank you very much for your assistance.

Sincerely yours,

P. J. COSCIENSKI CDR MC USN Pediatric Service

Enc: (1) APPROVED:

J. E. SCHANBERGER CAPT MC USN Chief, Pediatric Service By direction of the Commanding Officer BERTIFIED TO DE A TRUE COPY

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General Services Administration and meengency Comm. on Medical Records
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J. S. CHOVALTER
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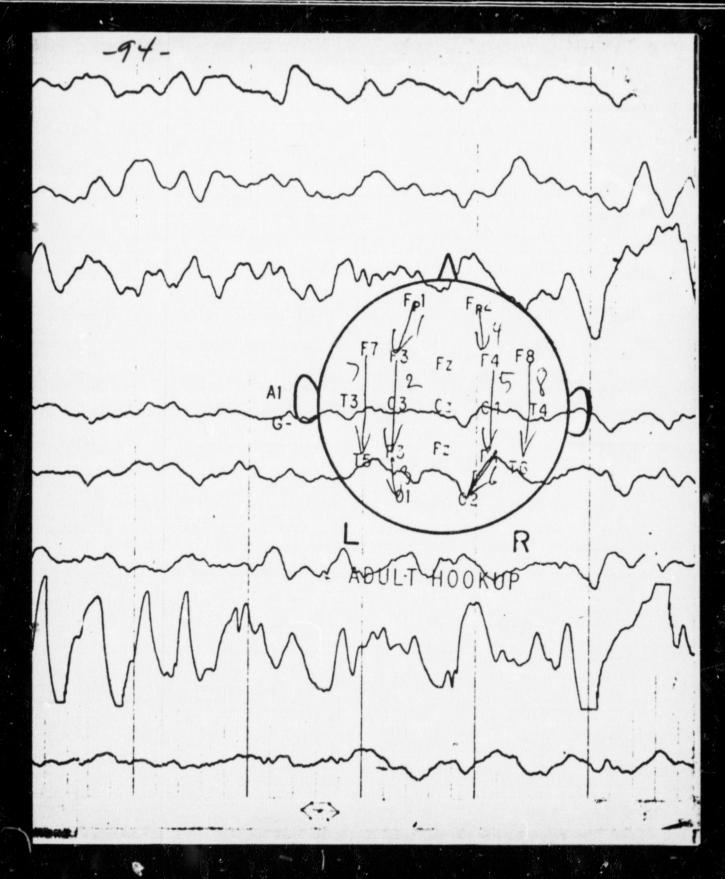
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JEROME A. DAVIB, M. D., P. C. 210 CORNELIA STREET SUITE 102 PLATTSBURGH, NEW YORK 12901

TELEPHONE: 561-3970

April 26 74

FOR PROFESSIONAL SERVICES: Joseph Camire

6/26/72: Consultation, neurological exam.

\$ 35.00

7/6/72: Office, recheck 5.00

7/7/72: Admission to hospital 15.00

7/12/72: Pneumoencephalogram 74.00

8/21/72: Discharged-38 visits 190.00

TOTAL DUE 319.00

App.

CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER PLATTSBURGH, N. Y.

NAME:

JOSEPH CAMIRE

AGE

ROOM

D: 9/4/72

DOCTOR: J. DAVIS

SUMMARY:

A one year old child admitted on 7/7/72 and discharged on 8/21/72.

One is referred to the admission history and physical for the details which preceded admission.

He was seen by Dr. D'Aran in consultation and his notes are on the chart.

He was seen by Dr. McCarthy and Dr. Poser.

he is basically a post meningitis cerebral atrophy problem with seizures. He was worked up thoroughly and when it was considered that nothing further could be done he was allowed to be removed to Sunmount State Institution.

The child hemoglobin 12.8, white count 11,100, accompanying differential. Urinalysis was normal other than showing some WBC's and epith. cells.

Chest x-ray and skull x-rays showed no definite abnormality.

Pneumoencephalogram was done which showed large hydrocephalus with a disparity filling in the lateral ventricles as reported by Dr. Koerner.

It was felt that nothing really could be done to help this child. I spoke with the family and arrangements were made for the child to be seen and transferred to Sunmount Institute.

JAD/1m



X-RAY CONSULTATION

NAME	Camte, Joseph A.	DATE:	7/12/72
ADDRESS	RFD 1 Box 168D, Keeseville, N.Y.	AGE	1.yr.
EXAMINATION	Pneumoencephalogram	X-RAY NO.	17070
REFERRING PHYSICIAN:	Dr. J. Davis	ROOM NO.	567-7 *

Pneumoencephalogram: Dr. Davis performed the procedure by injecting the approximately 30cc of air into the subarachnoid space via lumbar puncture in exchange for withdrawn CNS fluid.

There is no evidence of tonsillar herniation; simms disterna magna is visualized and the basilar disterns are seen. The latter ones being moderately dilated. The fourth sem ventricle is also visualized and appears in normal position and is only moderately dislated. The third ventricle is not clearly seen. The lateral ventricles are fairly markedly dislated and there is a disproportion of air filling of the two lateral ventricles and the left one contains substantially more air than the right one. On the brow up position the cortex about the frontal lobe anteriosuperially on the left measures lom. in thickness only. It does not appear that ventricles are in any way displaced. There is no air seen over the hemispheres even on the delayed study obtained about six hours after injection of air.

Conclusion: Fairly large hydrocephalus as described without air being demonstrated over the hemispheres. There is a disparity af filling of the lateral ventricles as described above. The reason for it is not apparent from this study.

H. J. Koerner, M.D.

HJK/sl

BEST COPY AVAILABLE

RADIOLOGIST

6/7/72

J. Pavis.
ReasSazfor admission: Seizures and right hemiparesis.

This is a 19 month old child who I saw in the office on referral.

The child is from the baseand has just been transferred up into this area.

The nationt's history dates back to five months of age from childhood to febrile illness, became progressively worse and also was diagnosed as having bacterial meningitis. There was no specificorganism from the cultures, the cultures were masked by Pre LP antibiotics. He was severely ill and recovery was incomplete leaving obvious sequelae and brain damage. He was discharged home with out-patient follow-up care that has centered largely on his persistent seizure disorder. He began this on Phenobarb, progressively Dilantin and presently he is on Phenobarb- Dilantin 2 1/2 cc twice a day.

There is noted weakness on the right side upper and lower extremity, less use of the right side and increased tone to it. He uses his left hand and left side for practically everything.

He is aware of light and dark. His hearing maybe impaired. He responds to loud noises. He communicates mainly by crying or smiling and occasional sound is made, but I am not clear on this at all and certainly not an intelligent sound in so far as I can ascertain. He does not sit well. This child is not keeping up with his siblings and he is not standing, not talking, he can say occasionally MaMa and PaPa, but he says PaPa mestly- more than MaMa.

Prior to the meningitis he was rather healthy and normal.

The birth and neonatal history are untemarkable.

He has been followed at the base. He had an EEG August 12, 1971 through the ARmed services and it was done with a 22 electrodes scalp, to scalp to scalp fashien to ear fashion. It demonstrated activity to 3-5 cycles per second over the entire right hemisphere, no focal abnormality. However the entire left hemisphere the frequency was slower and intersperse with paroxysms of high amplitude, also activity in the 1 1/2 cicle per second range. Spike and spike wave forms were seen throughout. The record was lousy confined to left posterior temperal parietal area but which could occasionally be seen arising independently from the left frontal area as well. Photic stimulation did not significantly alter the record. The impression was an abnormally EEG because of a moderate degree of left hemiparesis hemisphere showing slowing, intersperse with spike wave activity peredominantly in the left posterior temporal parietal area. He is being admittedPEG was recommended by where previously it was cancelled because of URI and this will be tried to be obtained on this present admission.

His examination is basefally as stated above. He seems to smile and change his facial features a bit, but he does have a rather blase look on his face and simost a retarded look.

J DAvis.

His-pupils

His head is normal in size and shape, it is 46 cm which is at the minus 2 SD for his age group 19 months.

Neck is supple.

Chest: Clear to percussion and auscultation. Heart; rhythm regular and no abnormal sounds.

Abdomen: Soft, normal bowel mounds.

Rectal deferred.

Extremities: No deformities, normally formed.

NEurologically as stated above. There is nothing further to add.

IMPRESSION: Status post meningitis with seizures and right haded hemiparesis.

JD/ 11

CAMIRE, JOSEPH

(1)

72: The child is being admitted tomorrow, seizure problem, post meningitis. Needs a complete workup and they will bring the base chart with them.

46 cm 1/ C

/26/72: Age 19 months, the child had severe menningitis, 4½ months of age, and I have leafed through very superficially, his base chart and we note that he has organic brain damage, secondary to menningitis, severe but probably stable, spastic quadriparisis right greater than the left, moderate and stable, impaired intellect severe, probably permanent, functional blindness, cortical, light perciption only and this remains the same. Functional deafness, cortical severe, seizures organic partially controlled, and rule out athetoid component, and stable family and well adjusted mother.

Seen on June 6 over at the base, by Dr. Mitnick, Maj., and the patient is on Dilantin, 2 cc bid, and the child is allergic to Penicillan. Had EEG on 8/11/71, abnormal, moderate degree of left hemisphere slowing and spike wave activity predominantly on the left posterior temporal parietal area. The child needs admission for PEG, brain scan, EEG and skull x-rays.

Evaluation by opthalmalogy regarding any functional vision remaining.

Admit sometime after the first of July, and mother was asked to bring the base chart with her at the time of admission.

At that time, I should have the whole chart copied, for myself and the hospital.

I suggested to the mother that she increase the Dilantin slightly to control the seizures better.

The child is having about two scizures a day, and he brings his legs up toward the stomach and he will stiffen up abit his eyes abd hands, and his legs will go out. The child is not keeping up with his similiar rate siblings, and he is not standing and not talking, and only says Mama and Papa and Papa more than Mama.

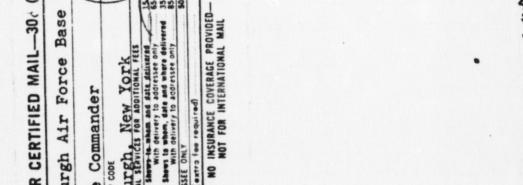
His head circumference is 43.7 centimeters, approximately, he was totally uncooperative for this.

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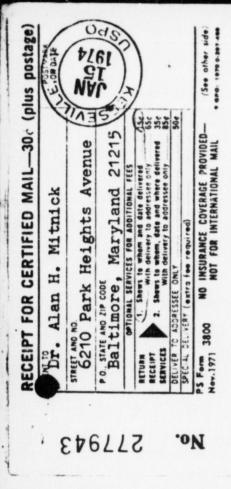
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Nov. 1971 3800

SPECIAL DELIVERY (extra fee required)

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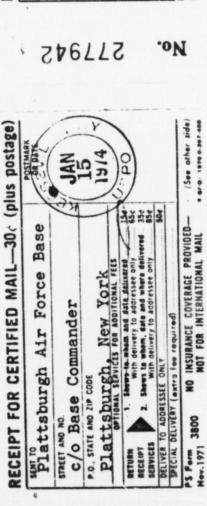
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ON.

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LIVINGSTON L. HATCH

ATTORNEY AT LAW

FRONT STREET KEESEVILLE, NEW YORK 12944

ESSEX ROAD WILLSBORO, NEW YORK 12996

January 14, 1974

Plattsburgh Air Force Base c/o Base Commander Plattsburgh, New York

Secretary of Defense Washington, D.C. Attention: Federal Tort Claims Department

Secretary of U.S. Air Force Washington, D.C. Attention: Federal Tort Claims Department

Dr. Alan H. Mitnick 6210 Park Heights Avenue Baltimore, Maryland 21215

Dr. Donald Marjer 85 Centinnel Hill Road Milford, Connecticut

· Re: Federal Tort Claims Camire v. U.S. of A.

To the above named:

Enclosed herewith is Notice of Claim.

Very truly yours,

prosperied A paint Livingston L. Hatch

LLH: eah Enclosure

DEPARTMENT OF THE AIR FORCE HEADQUARTERS UNITED STATES AIR FORCE WASHINGTON, D.C. 20314



9 AUG 1974

Livingston L. Hatch Attorney at Law Front Street Kesseville, New York 12944

> Re: Claim of Joseph Anthony Camire, James Anthony Camire and Gail Marie Camire

Dear Mr. Hatch

The claim of your above-captioned clients for alleged medical negligence at USAF Hospital, Plattsburgh Air Force Base, New York, has been considered under the provisions of 28 U.S.C. 2671-2680. After a thorough review of the evidence and the pertinent law, it has been deemed necessary to deny this claim.

The basis of this action is the failure of the evidence to demonstrate that a claim was filed within two years after the claim had accrued (28 U.S.C. 1346(b), 2401(b)).

If your clients are dissatisfied with this action, they may file suit in a United States District Court not later than six months from the date of the mailing of this notification.

Sincerely

William a. martin

WILLIAM A. MARTIN, Colonel, USAF Chief, Claims Division Office of The Judge Advocate General

Exh. E

September 23, 1975

Honorable James Foley U.S. District Court P.O. Building Albany, New York

Re: Camire v. U.S.A.

Hon. Sir:

While I was reviewing my medical records in our affidavits, I noticed that a portion of the consultation report was missing from Dr. Davis' report. I spoke with Mr. Hughes and he indicated to me that he had no objection to my sending these to you. By copy of this letter I am also sending copies to him.

There is only one thing I would like to say concerning this malpractice case that was not previously said at the argument of this motion. Mr. Hughes' argument and his use of the "reasonable man" theory is contrary to what in fact exists. If malpractice in a misdiagnosis area is so abvious, it would seem unnecessary to have to use expert testimony to establish malpractice. Mungerford v. U.S. 307 Fed. 2d 99 outlines the government's duty and the diagnostic process. It is clear that the government in this case owed a duty not only based upon its superior position to that of the claimants, but also in its confidential relationship establishing a reliance on the treating physician's opinion.

Very truly yours,

Livingston L. Hatch

LLH: eah cc: Asst. U.S. Attorney Richard K. Hughes

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TO DOCTOR ME (KELFS/074)		
PATIENT Joseph Comine	ROOMSERVICE	
PROBABLE DIAGNOSIS		
INFORMATION DESIRED: Diagnosis Only Diagnosis and advice Assume Care Diagnosis & Treat for		
Condition Other (Specify Below). Patient has cons	ented to Consultation.	
	M.D. Requesting Physician	
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TO DOCTOR H-JAMES OMC	DATE OF REQUEST
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PROBABLE DIAGNOSIS	
INFORMATION DESIRED: Diagnosis Only	Diagnosis and advice Assume Care Diagnosis & Treat for
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FORM N-79 - REV. 6-71	Requesting Physician
TO LOCTOR T. Davis	REPORT Follow-up Consultation
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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant, by his father JAMES ANTHONY CAMIER and his mother CAIL MARIE CAMIRE, and JAMES - ANTHONY CAMIRE and GAIL MARIE CAMIRE, Individually,

Plaintiffs,

- against -

UNITED STATES OF AMERICA,

Defendant.

74-CV-501

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The following proceedings took place on the 15th day of September 1975, at the United States District Court, Federal Building, Albany, New York, before HONORABLE JAMES T. FOLEY, United States District Judge.

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APPEARANCES:

LIVINGSTON L. HATCH, ESQ. Attorney for Plaintiffs Village Offices & Civic Center Keeseville, New York 12944

JAMES M. SULLIVAN, JR.
United States Attorney
RICHARD HUGHES
Assistant United States Attorney
Of Counsel
Attorney for Defendant
Federal Building
Albany, New York

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CLERK OF THE COURT: Joseph Anthony Camire, infant, by his father James Anthony Camier and his mother Gail Marie Camire, and James Anthony Camire and Gail Marie Camire, Individually against United States of America.

MR. HATCH: Ready for the plaintiff.

MR. HUGHES: Ready for the Government.

THE COURT: Proceed.

MR. HUGHES: If it please the court, this is a federal tort claims action, alleging malpractice on behalf of the defendant, Donald Major, M.D., a former staff physician at the Plattsburg Air Force Hospital.

The United States Attorney appears on behalf of the United States and Donald Major.

There are two motions to dismiss the complaint before the court on the grounds of failure to state a claim. One is submitted on behalf of Doctor Major, the other on behalf of the United States of America.

There are two separate grounds, and that is the reason for two separate motions.

The ground that the motion to dismiss on behalf of Doctor Major is that the action alleged for Doctor Major occurred solely and exclusively within the scope of his employment in April of 1971.

We believe under the doctrine in Barr versus Matteo, they are acts, alleged tortious acts occurring during the course of his employment, and as such he is protected under the doctrine of Executive Absolute Immunity.

We have submitted a memorandum to that effect, and in the reply memorandum it appears plaintiffs counsel now concedes that Dr. Major is insulated, protected absolutely from individual liability, and that if any cause of action accrues, it accrues against the United States of America.

THE COURT: Wait a minute. Is that your state of mind, Mr. Hatch?

MR. HATCH: Yes, Your Honor, apparently Dr. Major's position with the military does give him this immunity for his negligent acts in this case, so I have no objection to that claim being dismissed against Donald Major.

THE COURT: All right. You have made a separate motion on that?

MR. HUGHES: Yes, we did, Your Honor.

THE COURT: All right, I will grant that motion.

Do you have that motion? I will endorse

it and dismiss the complaint against the doctor.

MR. HUGHES: Thank you, Your Honor. If it please the court, may I continue with the --

THE COURT: Wait until I see if I have the papers. That is your amended notice of motion?

MR. HUGHES: May I see it?

THE COURT: All right, I will endorse that and dismiss the complaint against the doctor.

MR. HATCH: Your Honor, it is my understanding even though he is dismissed against, he is a witness that is accessible to interrogatories and discovery because of this immunity that he is granted by the statute?

THE COURT: Oh yes.

Now you can talk about the one against the Government.

MR. HUGHES: With respect to the United States of America, it is our position that the action is untimely for failure of the plaintiffs to file an administrative claim with the appropriate federal agency within two years of the accrual of the action.

Title 28, section 2104B, which reads "A tort claim against the United States shall be forever barred unless it is presented to the appropriate federal agency within two years after such claim

accrues."

Your Honor, as I stated before, this is a malpractice action. The infant plaintiff, Joseph Anthony Camier, was born on November 27, 1970 at the Plattsburg Air Force Base Hospital in Plattsburg, New York.

It appears that Mr. Camire's birth was normal in all respects. However, during April of 1971, the infant plaintiff apparently developed certain symptoms which as alleged in the complaint included high fever, nausea, convulsions and rigidity of muscles.

The infant plaintiff was brought by his mother, Gail Marie Camire, to the Plattsburg Air Force Base Hospital.

The father plaintiff was at that time a member of the Armed Forces of the United States.

At that time, which was in April of 1971, the infant plaintiff was allegedly seen by the former defendant, Donald Major, M.D. Dr. Major as I said was a member of the staff of that hospital. Allegedly the infant, showing these symptoms, was diagnosed by Dr. Major as simply cutting teeth or having a common cold, this despite the alleged presence of convulsions, rigidity, symptoms that might indicate

that perhaps something more than cutting teeth was present.

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There were alleged additional visits between the infant plaintiff and Dr. Major in April of 1971. Toward the end of that month, however, the plaintiff, James Anthony Camire, was transferred to the west coast and all the plaintiffs thereafter went to the west coast.

On April 27, 1971, after the last contact between the infant plaintiff and the alleged wrongdoer, Dr. Major, approximately one week after that last contact, the infant plaintiff was admitted to the Naval Hospital in San Diego, California.

He was seen at the emergency room, at which time the plaintiff Gail Marie Camire, who brought the infant to the hospital, was advised by t's staff at that hospital they suspected advanced meningitis and that treatment would have to be started immediately with antibiotics and so forth to correct this.

Now again let us stress to the court that about one week before, the infant having these same exact symptoms was diagnosed as cutting teeth or having a common cold. One week later the child was brought before another physician at another hospital and was immediately diagnosed as a suspected

meningitis.

It is respectfully submitted, Your Honor, that either the plaintiffs were well aware at this point that there had been a misdiagnosis or an alleged malpractice, or in the exercise of due diligence they should well have known that a malpractice may have occurred by a misdiagnosis by Dr. Major.

However, nothing was done by the plaintiffs until more than two years afterwards. The administrative claim -- this was in April of '71 that the misdiagnosis allegedly occurred -- the administrative claim, however, was not received by the federal agency until January of 1974.

Now to get around what would appear the rather elementary application of the statute of limitations that I cited before, the plaintiffs are relying on two doctrines, the doctrine enunciated in the Borgia Case by the Court of Appeals in New York, which has also been interpreted by the Southern District in the case that is cited in my brief, that is the continuous treatment doctrine. In that doctrine it is alleged and stated that as long as there is an ongoing relationship between the plaintiff and the wrongdoer hospital or doctor, the statute is tolled during that period, because an action should

not be commenced against the person that is treating

you while that treatment is going on.

However, Your Honor, in the Acaria Case, the Southern District originally denied a motion to dismiss on that ground to develop additional facts. During the course of the trial, however, it became clear to the court that the relationship at best had been only periodic between the wrongdoer and the plaintiff, and ultimately granted the Government's motion to dismiss the complaint.

In our case, however, there are no allegations that there was any contact between Dr. Major and the plaintiffs after April 22, 1971. True that the plaintiff infant, the son of a member of the Armed Forces, continued to avail himself of the free medical care of the United States in military hospitals until the Armed Forces member's discharge in February of 1973. However, Your Honor, the case relied upon by counsel to get around this doctrine, Kausik versus United States, in which the Circuit Court in that case upheld the District Court's dismissal of the complaint on the grounds of untimeliness, indicated it would be unreasonable to demand further treatment at the hospital, a period that will never expire so long as he is a seaman. In other

words, Your Honor, as long as the plaintiff James
Anthony Camire was still in the military service,
presumably that infant would still be availing himself of free medical care and that the Statute of
Limitations would be prolonged ad infinitum.

It is respectfully submitted if the court reviews the cases submitted by the Government in its motion to dismiss, you will see that this doctrine is not applicable to this case.

The second ground to circumvent the statute of limitations was because the cause of action did not accrue until sometime in mid-1973 when the plaintiffs first had their contact with plaintiffs' attorney and he advised them that perhaps a malpractice might have occurred.

However, Your Honor, if you read the complaint, which must be accepted as factual, in the complaint the plaintiffs allege that the wrong doing occurred in April of 1971. The infant went to California that same month. There was a medical diagnosis of suspected meningitis, spinal meningitis. Also in their opposing papers, Your Honor, plaintiff Gail Marie Camire admits that when she was in California with the infant, she was advised by the staff physician that the child did in fact have suspected

meningitis.

It is respectfully submitted, Your Honor, that the Blamis Ignoras rule is inapplicable, because by their own admissions, the plaintiffs were well advised more than two years before the administrative claim was filed that a misdiagnosis had occurred, and as such if they weren't aware of this fact, the reasonable man should have been aware of it and as such their cause of action is untimely and the complaint should be dismissed against the United States.

THE COURT: Is it agreed that Dr. Major -- was he the first one that treated this infant?

MR. HUGHES: There was another doctor,
Dr. Minnick, I believe. However, there were no allegations that he was a wrongdoer.

THE CCURT: Did he definitely make a wrong diagnosis? I don't want to put you on the spot.

MR. HUGHES: If we accept the plaintiffs allegations as true, which we must, it would appear that a misdiagnosis was made.

THE COURT: You are saying later it was confirmed by military doctors?

MR. HUGHES: That he had meningitis, but we must accept the plaintiffs allegations as factual for the purpose of this motion. I am not going to

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concede if we should go to trial on this, it would be up to the plaintiffs to prove it.

THE COURT: I understand that, but I am following what you were talking. At least the military people, later somebody found --

MR. HUGHES: That same exact month, yes, they did.

THE COURT: Some mistake may have been made in the beginning as far as the condition that existed?

MR. HUGHES: It would seem very possible, Your Honor.

THE COURT: All right, Mr. Hatch.

MR. HATCH: Your Honor, this matter involves an infant who is a quadriplegiac and has been that way since -- or has been determined as that in 1971. What our contention here is, under the continuous treatment doctrine --

THE COURT: How old is the infant now?

MR. HATCH: Four and one-half. Under the continuous treatment doctrine, Arcadia, which is the case that is referred to in the briefs, it would appear that in all these cases you would have to read the individual facts.

Arcadia is a federal prisoner who went to

TELEBAL BUILDING

Atlanta and several federal prisons and only had periodic visits concerning his eyes. They don't talk about the continuous treatment as to the doctor. In Kausik, they make reference to the fact that it could be a doctor or hospital relationship.

Now assuming we give the argument that Dr. Major is not responsible because of this executive immunity or this immunity given by statute, then somebody has to be responsible. The purpose of the continuous treatment doctrine is non-existent if the man can't be sued. You wouldn't interrupt the course of treatment and Judge Friendly says this is the purpose of it.

Now the facts in this case are quite simple and they are covered in the affidavits.

This girl, who was 21 at the time, first child, goes to the hospital. This man sees her three times, the baby, gives him medicine. They go to California. The child has convulsions. Now this girl doesn't have any medical training. She gets out to California and the doctor said "This is, we think, meningitis."

Now in Exhibit A, which is the entire medical record which we were able to get out of the federal government, it is clear that nobody knows

what is going on, because they first diagnose it as a tubercular, then meningitis, then in the final report they report about viral encephalitis. The doctor says that the meningitis is so masked by anit-biotics they are unable to get a culture to determine what it is.

At that time, this kid, this child is -the doctor says "You better get him baptized," and
they have him baptized. The kid is on the critical
list until that summer. It isn't until July 13, 1971
that even the people out in California even have the
medical records, so they don't know.

I cite the page of the medical record indicating that on July 13, 1971. This is an indication that they have not received the medical records that are normally forwarded with the military personnel as they move along.

The second point is the entrance into the hospital. The admission card has no determination, no diagnosis, no nothing. She knows nothing about what is wrong with this child and she doesn't know anything about it until she comes back to Plattsburg, New York, at which time she goes back to the Plattsburg Hospital on June 6, 1972. All the time this child is continuously being treated for meningitis

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and the trauma sequela that goes from it. As a part of it, she goes back to the Plattsburg Hospital, the pediatrician, and they said "You better get a civilian person, take him over to Dr. Davis." Dr. Davis gets a consulting doctor by the name of Dr. Davian. Dr. Davian never tells my client, Dr. Davis never tells my client, but in the back of the medical report he says this is a case of untreated meningitis and that is what caused the debilitation.

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In June Dr. Davis sits down and says "Young lady, your child is going to be permanently damaged for the rest of his life, we don't expect him to live more than 7 or 8 years," and at that time is the first time she is aware that Dr. Major didn't do something that he was supposed to do. Her actual knowledge is not what she reasonably should know, but her actual knowledge of what was wrong.

She came to me in 1973 through another case and we discussed the case. It took us a year and a half to get the records which we were entitled to. It wasn't until then that we had a chance to look at what had occurred.

If you take the continuous treatment doctrine; I will agree with what they say in Kausik, they said the seaman, he had a condition that was

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caused from a retinal examination and injecting some fluid. They said that the trauma was there, it existed at the time, he knew about it and he continued to go on and on. Seven years later he filed a claim. Well, he was an adult. I know that Pitman says that we are not too concerned about infants in this situation, but there is a case Jordan versus United States, and I looked at all the cases and I tried to figure out what each circuit came up with, and I finally found out how to read these cases. I took them all and put them in date order. Back in 1962, the federal courts had one attitude toward this situation. As late as May 1974, their attitude is beginning to change. Now Jordan sets forth what is necessary for the discovery rule, what are the elements. In this case, the man's operation, Jordan, occurred in June of '71. He filed a letter with the Veterans Administration concerning the service connected operation in 1970 and the Sixth Circuit said that wasn't enough, he knew what was going on. You continue to look at these cases as you go along and you will see there are certain elements of this, I think what it is they take a person, they take the nature of the injury, they take all these factors together and they look at the trauma, the sequela,

and the information this person had to determine what a reasonable man would determine in this case.

Basically, the argument is the Government says "Major, you are not responsible for anything you do."

Now Judge Desmond in the Court of Appeals said "We don't want doctors to be sued while they are going through the course of treatment, they won't do the right thing." He might be liable, but Dr. Major, as the Government said, "You have no responsibility."

Now the relationship with United States of America, the government, the Department of Defense continued until February of '73. Now in Ashley versus United States, the Ninth Circuit at 413

Federal (2d) 490, there was an implication, they talk about the Second Circuit having dictum suggesting that as long as they are under the Government care, the continuous treatment rule, this Ninth Circuit says that that shouldn't be the rule. However, in any of the cases where the continuous treatment rule has fallen apart, a man went in and maybe had his eye looked at one month, two years later, but this kid was from the day of this illness to the day they left the military, was under the

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constant care of the Government, and the medical records speak for themselves.

So our argument is a little different relationship is created here. We have a continuous treatment not only to the doctor-patient, but we also have a continuous treatment as to the government which it now says "Donald Major, you are not responsible, we are." And we did have a continuous relationship with United States of America. That is No. 1.

No. 2, the continuous treatment rule, the cases speak for themselves. I am sure you will have to take the facts and determine whether under the affidavits there was reasonableness or whether a person in that situation should have known or shouldn thave known, but what I am saying is not what we said on January 4, 1974, what went through that girl's mind when her baby was laying there dying, is the first thing that she has to do "I have to get a lawyer because I think there is something wrong."

No, that is not our argument. The argument is now a person sits down and says "The Doctor said this. I went to this doctor and he said that." And you put that all together and now we have to go back to what she said at that time.

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I would respectfully request that if the papers as a matter of law are not sufficient -- I noted in the last decision, Jordan, they direct a hearing in this situation, and I respectfully submit that the case law, what I did with the case law is I labeled each case of the time down when it was supposed to have been discovered, when it should have been discovered, and the time seems to be very important.

If you take April 1, 1971, she makes their claim in 1974, if you use the discussion in Borga, if they had made their claim while they were in the military, it would have been at the time that they were still under the care and treatment of the United States Government.

I submit that my memorandum raises the two issues and I respectfully ask the court to decide those issues.

MR. HUGHES: Your Honor, the law in the Second Circuit is Kausik. There may be other laws in the other circuits and most of the other laws in the other circuits don't even accept the continuous treatment doctrine. However, Kausik talks about a relationship between a wrongdoer hospital and doctor and patient. This relationship between the

doctor and patier

A. COURT REPORTERS

alleged wrongdoer, Dr. Major, and the plaintiff.

terminated in April of 1971. The claim is filed in

January of '74. That same month they had been advised by the staff in San Diego that they suspected

meningitis. The infant was exhibiting the same

symptoms that he exhibited when treated by Dr. Major.

Dr. Major had allegedly diagnosed it as cutting teeth

and common cold. One week later with the same

symptoms, meningitis.

Also, Your Honor, as far as the continuous treatment with respect to the hospital, if the court reads the Kausik decision which is cited in my memorandum, it will become clear that the plaintiffs cannot rely upon the fact this infant continued to be treated in a government hospital. There was no prohibition, they had discovered this alleged malpractice, they could have filed a claim with the United States and this they failed to do. We respectfully request, therefore, Your Honor, that the complaint against the United States should be dismissed.

THE COURT: I am going to reserve decision.

Is all your briefing in now?

MR. HUGHES: Yes, I have two briefs in.

THE COURT: You are satisfied with your briefing?

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MR. HUGHES: Yes, Your Honor. There is one brief that I noticed the secretary put the pages in incorrectly, page 3 of this. THE COURT: Yes. I think what you should do, the other motion was granted and I endorse that motion. I think you should go over the papers with the Clerk and see the ones that relate only to this motion that I am reserving on so I can take those papers and then you can correct the original briefs.

(Thereupon the foregoing motion was concluded.)

This is to certify that the foregoing record is a true and accurate transcript of the proceedings had at the time and place noted in the heading hereof.

> Official Court Reporter United States District Court Northern District of New York

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